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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL E. PERSON,

Defendant and Appellant.

D052500

(Super. Ct. No. SCD205861)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Affirmed.

A jury convicted Michael Enrico Person of residential burglary (Pen. Code, §§ 459/460)<sup>1</sup> in the first degree. In a bifurcated proceeding, Person admitted he was on bail status at the time of the burglary (§ 12022.1, subd. (b)), and he had a prison prior, several serious felony and strike priors (§§ 667.5, subd. (b), 667, subds. (a)(1), (b)-(i), 1170.12). The court sentenced Person to an aggregate term of 20 years in prison.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

Person's sole issue on appeal is that the trial court erred in admitting evidence of his poverty to show he committed the burglary. We affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

On Friday morning, May 12, 2006, Titus Avila left his home in North Park, locking all the windows and doors, and went to work. At the time, Avila rented one room of the two-bedroom house to Ernest Gustave, who had already left for work. Although Avila normally worked nights, he worked during the day on Fridays, as would Gustave. Before Avila left, he secured his small dogs in their kennel.

Gustave returned home first, between 4:00 and 4:30 p.m., and noticed his key turned easier than normal as he entered. He could not say if the door was unlocked, however, and continued straight to his room. Upon reaching his room, he noticed his door was ajar and some of his belongings had been rifled through. Believing Avila had been in his room looking for something, Gustave did not think anything was wrong. When he walked into the kitchen he saw that some things were knocked over and broken, but he believed that the dogs may have gotten out. It was not until Gustave entered the bathroom, and noticed Avila's watch case was empty, that he believed a crime had occurred. Gustave looked around the residence and found that a dining room window was broken. Knowing Avila had drug paraphernalia in plain sight, Gustave decided not to call police and to wait for Avila to return home.

When Avila returned from work, sometime after 6:00 p.m., Gustave told him about the burglary. Avila called police and looked around the house. He found that a cement bench had been moved and a plastic cooler had been placed on top of it. The

bench and cooler were directly beneath the broken window. Avila and Gustave both noticed that the blinds on the inside of the broken window had a little blood on them. Avila knew the blood was not there before that night. Avila found that his watch collection, some jewelry, over a \$1,000 in cash, and his bicycle<sup>2</sup> were missing. When police arrived, they made a report and took samples of the blood for a DNA profile. A lab technician created a DNA profile from the samples and entered it into a database, but no matches were found.

Nearly a year later, San Diego Police Detective Donald Williams had reassigned the Avila case to himself. Williams received a report that a match had been found on the DNA database. According to the database, Person's DNA closely matched the DNA taken from the blinds. Williams arrested Person and took him to the police station. After Williams took more DNA for a confirmation sample, Person waived his rights and spoke with Williams. When Williams told Person that his blood matched blood found at a burglarized home in North Park, Person told Williams: "he knew what [Williams was] talking about but he couldn't talk about it. It was a bad time in his life." Person also told Williams that he had lost his job during that time.

At trial, the defense sought to show that Gustave was the real thief. Person's counsel focused on Gustave's behavior when he entered the home, the fact that none of Gustave's property was taken, and that Gustave knew where Avila kept his valuables.

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<sup>2</sup> The bicycle was taken from Avila's unattached garage. A window to the garage appeared to have been forced open to gain access.

Person's counsel also questioned Williams and Avila regarding the broken window, which had a metal bar through the middle of it. Although Williams agreed it would be a tight fit, he believed a person could have squeezed through the window to enter the home. The jury disagreed with Person's theory and found him guilty of first degree burglary.

## DISCUSSION

Person contends the trial court erred in admitting poverty evidence as a motive for the burglary, and that this error prejudiced him. Person argues that his "statements that he lost his job and it was a difficult time in his life were inadmissible." He further claims "the admission of the statements in concert with the prosecutor's explicit argument to the jury that it demonstrated motive to steal requires reversal." The People respond that "the challenged statement did not amount to mere general evidence of poverty going to the issue of motive, but instead constituted admissible circumstantial evidence that appellant was the person who committed the crime." In any event, the People rely mainly on the argument that any asserted error was harmless. We conclude no error occurred and affirm the judgment.

## I

### PROCEDURAL BACKGROUND

Before jury selection, the court heard a motion in limine regarding Person's statements to Williams at the police station. The prosecution argued that the statement "[t]his year had been a bad time in his life. He had lost his job and had been drinking a lot" should be admitted to show motive. Person's defense counsel argued that this

statement should not be admitted because it unduly prejudiced Person under Evidence

Code section 352. The court ruled otherwise, stating:

"[O]n the motive argument, I'm not sure how that statement 'I lost my job,' how that's unduly prejudicial. I mean, people lose their jobs everyday, and the jurors, I presume they understand that we're in kind of a tough economy right now. So I don't think that's a statement calculated to arouse the passions or play on the passions of the jury."

The court ruled: "[S]o all I'm going to allow [Williams] to say is . . . Person said that he knew what Mr. Williams was talking about, but he could not talk about it, and that he had lost his job."

Later, before Williams testified, the court revisited the admissibility of Person's statements. The court apparently had not ruled on the admissibility of Person's statement "[that] year has been a bad time in [his] life." Again, defense counsel objected to the admission of this statement. The court ruled:

"Under 352, weighing and balancing the ground rules here, we can discuss that but nothing else. . . . I think that has some substantial probative value which is not outweighed by what [defense counsel] has raised and I mentioned under 352. So that's my ruling in that regard."

The prosecution then elicited the statements from Williams. Williams testified that Person told him "he knew what [Williams] was talking about but he couldn't talk about it. It was a bad time in his life." Williams also testified that Person told him he had lost his job.

In closing argument, the prosecution reminded the jury of the statements and explained that they could be used to show motive. The prosecutor told the jury:

"[M]r. Person responded by saying, 'I know what you're talking about, but I can't talk about it.['] He went on to excuse that this was a bad time of his life; that he had lost his job this time period when the burglary happened. You get to use those statements that Mr. Person made to find him guilty. You get to use that in addition to the DNA evidence to find that he committed this crime. [¶] There is an instruction about motive. It's not something that the People have to prove. We don't have to prove to you beyond a reasonable doubt that Mr. Person had motive to commit this crime. But if you think, after listening to the facts, that Mr. Person had a motive, you get to use that. It's a tool that you get to use to find him guilty. [¶] And in this case he said he lost his job. It was a bad time in his life. And if you think that his status at that time gave him a motive to commit a property crime, to steal, to take money, you get to use that fact to help you find that he is guilty."

With these procedural facts in mind, we address Person's claim of error.

## II

### THE TRIAL COURT PROPERLY ADMITTED THE EVIDENCE

Claims of error in admitting evidence are reviewed under the abuse of discretion standard. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113; *People v. Rowland* (1992) 4 Cal.4th 238, 264.) "Under this standard, a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*Guerra, supra*, 37 Cal.4th at p. 1113, citing *People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Evidence of a defendant's poverty has repeatedly been held inadmissible to prove motive in theft and robbery cases. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 96 (*Cornwell*); *People v. Koontz* (2002) 27 Cal.4th 1041, 1076 (*Koontz*); *People v. Wilson* (1992) 3 Cal.4th 926, 939.) The "risk of causing suspicion of indigent persons generally

outweighs the probative value of such evidence." (*Cornwell, supra*, 37 Cal.4th at p. 96.) Although such evidence seems logically relevant, " 'it would prove too much against too many. [Citation.]' " (*People v. Carrillo* (2004) 119 Cal.App.4th 94, 102.) The " 'lack of money gives a person an interest in having more. But so does desire for money, without poverty. A rich man's greed is as much a motive to steal as a poor man's poverty. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value.' " (*Carrillo, supra*, 119 Cal.App.4th at p. 102, quoting *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109.)

This general rule against admitting evidence of financial status as motive in theft cases has some exceptions. "[E]vidence of the defendant's indebtedness or relative poverty may be admitted without undue prejudice to persons of limited means in order 'to eliminate other possible explanations for a defendant's sudden wealth after a theft offense.' " (*Cornwell, supra*, 37 Cal.4th at p. 96, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.) Also, evidence of poverty may be introduced to refute claims by the defendant that he did not commit the offense because he did not need the money. (*Koontz, supra*, 27 Cal.4th at p. 1076.)

To address Person's claim of error, we must determine whether the evidence admitted in this case fits under the general rule prohibiting evidence of poverty. We conclude that it does not. The evidence in this case, Person's statements he lost his job and the period of time had been a tough one for him, can be construed as an admission in addition to evidence of motive for the crime. Although the trial court, in ruling on the in limine motion, chose to parse the statement into several parts, we read the statements

together in context to better understand their meaning. In doing so, we believe a jury could find the statements made by Person, after Williams made an accusatory statement that Person was involved in the burglary, amount to an admission and attempt to excuse his involvement in the crime. Williams told Person that the DNA from the blood found in Avila's house matched his DNA. In response, Person told Williams he knew what he was talking about, but that Person could not talk about it. As Williams testified, Person continued by saying he had lost his job during that time and that it was a bad year for him. Person's first statement that he knew about the burglary can reasonably be construed an admission of at least some involvement. The subsequent statements, taken in context, are Person's attempts to excuse his involvement and get sympathy from Williams. In other words, Person tried to defend his involvement in the burglary.

Of course, the statements Person offered to excuse his conduct may touch on his motives. The statements refer to possible reasons Person had for entering a home to steal valuables. However, the admission of this evidence does not fit under the numerous cases holding that evidence of poverty is inadmissible to prove motive, because Person made the statements to excuse his involvement in response to an accusatory statement. Person's statements are tantamount to an admission, and not general evidence of Person's financial status. We see no error in admitting the statements for this purpose. Although the prosecutor later mischaracterized the evidence as simply motive evidence in her closing argument, this fact does not change our conclusion. The prosecutor did not admit evidence of Person's lack of employment or financial status, nor did the prosecutor call witnesses to testify to Person's difficult times during the period of the burglary. Instead,



the prosecutor elicited, from Williams, statements Person made to excuse his involvement in the burglary. Because the evidence was admissible, the court did not abuse its discretion in admitting Person's statements that he had lost his job and that the prior year had been a bad one for him.

Person mentions the possibility of ineffective assistance of counsel in failing to perfect the objection after his counsel had made a general objection. We do not address this claim, as it is made in passing and is undeveloped, but note that because we conclude the evidence is admissible, defense counsel's objection would have been futile. (See *People v. Anderson* (2001) 25 Cal.4th 543, 587.) However, Person is not foreclosed from pursuing alternative avenues, such as a petition for writ of habeas corpus filed in the trial court, to raise a claim for ineffective assistance of counsel.

#### DISPOSITION

The judgment is affirmed.

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HUFFMAN, J.

WE CONCUR:

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McCONNELL, P. J.

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BENKE, J.